

Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law

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As Poland has careened away from the rule of law, the European Commission has struggled to work out its response. The new “[complementary Recommendation](#)” issued on 21 December 2016 gives the Polish government more time to address the Commission’s growing set of serious concerns, but it is already clear that the Polish government is using its extra time to further consolidate its constitutional capture.

In fact, the Commission issued its new Recommendation on the very day that Andrzej Rzepliński, the Constitutional Tribunal’s brave President, stepped down at the end of his term, setting in motion the endgame for the ultimate capitulation of the Constitutional Tribunal that was [forecast months ago by](#), among others, Maximilian Steinbeis, the editor of the *Verfassungsblog*. The Commission’s Recommendation clearly acknowledged that the Tribunal was about to be lost, but still, it failed to do anything that might have given the government pause in its relentless drive to abolish the Tribunal’s independence. The Commission’s new Recommendation was therefore dead on arrival, since the events it tried to forestall had already come to pass. The Commission’s delay and continued reluctance to start the sanctions process will make it harder for any external pressure to undo the damage.

In this post, we consider why the Commission hesitated to respond, and what this means for the future of the EU. Part of this story is that Article 7 TEU, which lays out a warning and sanctions process for Member States that violate basic EU values, is difficult to successfully invoke, as it sets up supermajority hurdles at both the European Council and the European Parliament before sanctions may be adopted. But there are other reasons too. Given Europe’s multiple crises at the moment, the internal affairs of a rogue government or two may seem less critical to Europe’s well being than crises that affect multiple states at the same time, like the refugee crisis, the Euro-crisis or the fallout from Brexit. But the proliferation of governments inside the EU that no longer share basic European values undermines the reason for existence of the EU in the first place and threatens the functioning of a legal framework which ‘is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU’ ([Opinion 2/13](#), para. 168).

The “values crisis” may not seem as urgent as the other crises on European plates, but it has the most far-reaching implications for the European project because without common values, there are fewer reasons for the EU to exist. Europe therefore fails to act at its peril. And it needs to act before rogue governments become ever more entrenched.

1. The Abdication of EU Institutions in the Polish Case

While the criticism in [Part I of this post](#) has been directed at the Commission for its failure to address the Polish problem more forcefully by triggering Article 7 TEU before the capture of the Polish Constitutional Tribunal was completed, the Commission’s continuing failure to defend the rule of law is due in no small part to the European Council’s shameful lack of action. The European Council has done nothing about either Hungary or Poland over the seven years that constitutionalism has been under attack first in one and now in both. On the eve of a confrontation in Poland between governing party MPs and opposition protestors in December 2016, European Council President Donald Tusk, himself a Pole, broke his silence for the first time, [suggesting gently that all sides might behave themselves, and honour the constitution](#). But the European Council did not act as an institution.

This abdication of the European Council as the EU’s sixth largest economy abandons the rule of law reveals yet another weakness in the European project: A country that could meet the entry criteria to join the EU was

presumed to retain its constitutional-democratic commitments over the long haul so the EU gave itself few options to correct problems if a country's commitments began to falter. If the EU is not a community of values, however, it is only an economic shell. Amnesty International was therefore right to call for European governments to 'step up to the plate and support the people of Poland by placing this serious threat to rule of law and human rights on the agenda of the Council' (see [press release](#) issued on 21 December 2016).

Given the European Council's lethargy on first Hungary and now Poland, one wonders where the countries are which just a few years ago asked the Commission to introduce a 'new, light mechanism' to enable it to make recommendations or report back to the Council 'in the case of concrete evidence of violations' of the EU's fundamental values or principles such as the rule of law. Ironically, Poland was one of the eleven signatories of the so-called [Westerwelle report](#). The Polish Prime Minister was then Donald Tusk, who is now President of the European Council and one of the European leaders who has most conspicuously failed to act to arrest the deterioration of the rule of law in Poland, speaking out only once after more than a year of assaults on constitutional institutions. Perhaps this is because his home government has [threatened](#) not to back him for renewal in the post and has even held out the possibility of bringing criminal charges against him on the basis of an investigation that most observers outside the country believe is [politically motivated](#). And yet no EU official has forcefully spoken out against these attempts by a Member State to bully its nationals serving in EU offices when that bullying itself is connected to the assault on the rule of law.

The Council has been similarly lethargic and its inaction is furthermore accompanied by inconsistent public pronouncements. In the [Joint Declaration on the EU's Legislative Priorities for 2017](#) it recently co-signed, a number of important issues are identified as goals, including the pursuit of 'our commitment to common European values, the rule of law and fundamental rights, including our joint engagement to stand up against discrimination and xenophobia'. One may also note in passing that Robert Fico signed this joint declaration on behalf of the Council as Slovakia was then holding the rotating Council Presidency. This is the same politician who [said](#) in 2016 that 'Islam has no place in Slovakia' and was included in Politico's 2015 '[top 10 wackiest anti-refugee remarks](#)', alongside Marine Le Pen, Jaroslaw Kaczyński, Viktor Orbán to name but a few. In short, values backsliding, rhetorically speaking, is not confined to Hungary and Poland.

Notwithstanding the gap between rhetoric and action, this continuing lack of support from the European Council and the Council, both representing the Member States within the EU, at least renders the Commission's reluctance to activate the misnamed 'nuclear option' understandable (see our [previous analysis](#) of President Juncker's comments on Article 7). There may be indeed a cost to be paid if the Commission triggers Article 7 and none of the other key EU institutions take any note of it. To wait however for a clear signal from a majority of national governments that Article 7 would succeed seems, however, like an excuse for not doing anything. Indeed, why would any national government signal its intent to support the Commission when there is no certainty the Commission may trigger Article 7? Such a public stand would require paying a diplomatic price for a position which may ultimately be proven unnecessary.

Because the Commission, rightly or wrongly, expects political backing before moving to the next logical step, this leaves it no other option than working with the Parliament. Strictly speaking, the Parliament could activate Article 7 itself, though there are supermajority hurdles there also: for the purposes of Article 7, the Parliament is required to "act by a two-thirds majority of the votes cast, representing the majority of its component Members" (see Article 354 TFEU). But considering the Commission's acquired expertise in the situation in Poland and the complications of party politics in the Parliament, it would indeed make sense for the Commission to take the lead and activate Article 7.

Having two of the three major institutions behind a condemnation of Poland is better than one, even if not enough to actually issue any sanctions. Article 7 requires Council supermajorities to determine that there is a "clear risk of a serious breach" of EU values such as the rule of law in a Member State while requiring unanimity in the European Council members save the offending state when it comes to determining the existence of a "serious and persistent breach". One may only hope that an eventual collaboration between the Parliament and the Commission might further shame the Council or the European Council into acting. But the high hurdles previously noted do not make the Article 7 sanctioning process easy.

That said, the Parliament has actually been quite active in both Hungary and Poland, while leaving the actual triggering of Article 7 to the other EU institutions. Parliament took the lead in the case of Hungary, when the [Tavares Report](#) of July 2013 passed the European Parliament on an overwhelming vote and called upon the Commission to begin monitoring Hungary with the goal of eventually triggering Article 7 if Hungary did not change its ways. Following the Report, however, neither the Commission nor the Council took up the responsibilities that the Parliament had urged on them, and nothing serious was done about Hungary's backsliding. Though this inaction from the other institutions could have discouraged the Parliament from continuing, the Parliament tried again in [December 2015](#) when it directly called upon the European Commission "to activate the first stage of the EU framework to strengthen the rule of law" in order to evaluate "the emergence of a systemic threat in that Member State which could develop into a clear risk of a serious breach within the meaning of Article 7 TEU". But here, too, the Commission failed to act. And while the Commission on [30 November 2015](#) did accept to register a European Citizens' Initiative requesting the activation of Article 7 against Hungary, it was [subsequently closed by its initiators](#). None of these prods from the more democratic institutions of the EU have gotten the Commission to budge.

With regard to Poland, the Parliament has similarly expressed its concerns with a [resolution](#) in September over the situation identified by the Commission in its rule of law dialogue with the country. The resolution expressed support for the actions of the Commission and expressed the Parliament's concern about the fact that the Polish government seemed unwilling "to cooperate with the Commission pursuant to the principle of sincere cooperation" in order to solve "the ongoing constitutional crisis" in Poland. But the Parliament did not even mention Article 7. It instead clearly indicated that the ball was in the Commission's court.

The problem is that while EU institutions get their act together, the capture of the Constitutional Tribunal by PiS-compatible judges means that it is just a matter of time before the PiS majority on the Tribunal is able to directly or indirectly overrule the judgements referred to by the Commission in its recommendations, while ignoring the most blatant violations of the Polish Constitution whenever it is required to facilitate the implementation of Kaczyński's illiberal agenda. Indeed, Julia Przyłębska's appointment as the new president of the Tribunal on the day the recommendation was issued ignored the strongly expressed views of the Commission that the appointment of a new president be deferred. In light of her previous record, one might reasonably expect that the Tribunal has been for all intents and purposes been effectively neutralised already (for further analysis, see Prof Koncewicz, [Living under the unconstitutional capture and hoping for the constitutional recapture](#)).

As evidence, the new President of the Tribunal has already made a decision to seat the unconstitutionally elected PiS judges and is now in a position to take up (or not) particular matters before the court, stall the controversial cases to the point where they become moot, and rule in the government's favour whenever judicial support is required. To maintain the fiction that the Constitutional Tribunal is functioning, we see that the Polish authorities have already started to refer controversial measures to the Tribunal when they would find a judicial rubber stamp useful. Last week's decision of Polish President Duda to send the controversial freedom of assembly bill to the Constitutional Tribunal ([Reuters](#), 29 Dec. 2016), just a few days after the Tribunal was captured, shows that the government now trusts that the Tribunal will not disrupt their plans to consolidate autocracy in Poland. Rather the reverse.

Once again, Hungary provides the model. As happened with the Constitutional Court in Budapest, the now-captured Constitutional Tribunal in Warsaw can be expected to approve whatever the government puts before it. The government can then use the court's positive decisions to defend itself from external criticism. It is indeed easy to imagine Polish Prime Minister Szydło saying to Commission First Vice President Timmermans: "Last week, you said you were defending our Constitutional Tribunal and this week you reject its decisions." As in Hungary, one might expect that the Tribunal may hold some minor measures incompatible with the Polish Constitution from time to time if only to preserve appearances and convince uncritical outsiders that the system is still formally compliant with the rule of law.

In a [study](#) worth reading, Prof Batory shows that countries deficient in the rule of law like Hungary often engage in creative and symbolic compliance strategies to enable the Commission to disengage from conflicts it judges too costly while still maintaining its credibility. The ploy works even when compliance with EU values is not achieved on the ground. The experience of Hungary shows that even if Article 7 were to be triggered by the

Commission in the spring with regard to Poland, the Council would then be in a position to pretend that the previously denounced systemic threat to the rule of law had already been fixed because the Constitutional Tribunal would be operating and the government will be complying with its new decisions. By that time, the various reports and recommendations that the European Commission and Venice Commission have produced will seem to be out of date, leading credence to a Polish governmental claim that it has taken note of the Commission's various recommendations and everything is now fine.

Given the time it takes to mobilize the action of European institutions, fast-moving situations can always escape being policed because the EU is not nimble enough to act at the same pace. We have already seen European institutions try and fail to discipline Hungary when the Orbán government moved to swiftly bring all formerly independent institutions under party control. Orbán always claimed to have solved all of the problems identified by the European Commission just before the sanctions bit. European institutions now repeat the same dance with a different partner who follows the same steps. If the Polish government looks to Hungary as a positive model, then European institutions should look to Hungary as a negative one. The EU might reasonably suspect that it will have the same ineffective results by following with regard to Poland the same set of threats followed by inaction as it did in Hungary.

2. What else can be done?

2.1 Learning from past mistakes: What EU institutions did not learn from Hungary

The key finding one may draw from the Commission's ongoing struggle with Poland is that it has not learned the right lessons from its past dealings with Hungary. When Orbán's Fidesz party came to power in 2010 and started its methodical capture of state institutions and the media, the Commission wrongly assumed they were just dealing with a national government intent on implementing a nationalist agenda and sought to rely on the traditional [infringement procedure](#) to fight the most visible violations of specific provisions of EU Law.

This strategy utterly failed. It failed first because not only the Commission but also all other EU institutions did not grasp that they were dealing with a new type of meticulous and legalistic autocrat following a clearly designed blueprint that aimed to progressively dismantle national checks and balances in order to establish a majoritarian one-party autocracy which would never have to fear subsequent elections.

The European Parliament correctly diagnosed the problem in July 2013 and [urged the Commission](#) 'to focus not only on specific infringements of EU law, to be remedied notably through Article 258 TFEU, but to respond appropriately to a systemic change in the constitutional and legal system and practice of a Member State where multiple and recurrent infringements unfortunately result in a state of legal uncertainty, which no longer meets the requirements of Article 2 TEU.' Had the Commission taken this diagnosis fully on board, it may have been convinced to look beyond individual breaches of EU law and consider instead 'the combined impact of a number of measures exacerbating the state of democracy, the rule of law and fundamental rights' as requested (again) by the [European Parliament in June 2015](#).

In the Commission's defence, Orbán's strategy for dismantling the 'liberal state' was not easy to decipher, at least initially, as this was indeed an unprecedented phenomenon in the EU. The Commission might also have been hampered because the European's People Party was doing its best to shield Orbán from criticism in the name of partisan politics (see Prof Kelemen, "EPP ♥ Orbán" in [Politico.eu](#)), even though at least half of the EPP members split from the party's official position and refused to block the Tavares Report in July 2013.

Perhaps even more significant was the fact that the Commission received no support from either the European Council or the Council for more drastic actions or sanctions in the Hungarian case. To give a single example: rather than supporting unambiguously the Commission's rule of law Framework, national governments acting within the framework of the European Council decided instead to establish their very own "[annual rule of law dialogue](#)", which is tragically ineffective because it asks Member States to report on themselves, and this tends to produce more self-congratulation than criticism. The Council's new rule of law dialogue followed on the adoption of a poorly argued opinion by the Council Legal Service in which implausibly denied the Commission's authority to adopt its Rule of Law Framework (for a critique of the Council Legal Service's opinion, which has

since been referred to by the Polish government to argue that the Commission is acting ultra vires, see Profs [Baratta](#); [Bogdandy et al](#); [Besselink](#); [Hillion](#); [Kochenov & Pech](#)).

Notwithstanding the lack of reliable support from the Council, the Commission's strategy also failed because Orbán had learned to implement a *fait accompli* strategy, which included tactical retreats and the adoption of the most minimalistic formal remedies when found in breach of EU law, leaving values-violating practices in place. For example, when the [Court of Justice ruled against Hungary](#) for firing its data protection commissioner, Hungary successfully argued that it should not fire the new more politically compliant one whose "independence" should be protected but should simply pay compensation to the fired one. The same thing happened with the judges who were the victims of a newly announced [lower judicial retirement age](#). In other words, what PiS has learned from Orbán is that EU will never ask for a sitting official to be removed [even when illegally appointed](#). This is why Polish authorities have ignored the Commission's recommendations until it was in a position to put its unconstitutional judges in place. Now, the EU will find virtually impossible to dislodge the unconstitutionally selected judges in order for constitutionality to be restored. If the Polish case is like the Hungarian one, the Commission may even be satisfied with a solution that gives even more protection against removal to the foxes that have been let into the henhouse as a way of dealing with the fact that the previous roosters were manhandled. In Hungary, the new judges appointed in place of the prematurely retired ones were given additional guarantees that they could now not be removed as part of the Commission's settlement of that case.

Another particularly disheartening feature of the current situation is that some in the Commission still seem in denial about how illiberal forces capture democratic regimes. The Commission's reaction to the Hungarian constitutional capture revealed a persistent failure or unwillingness to look at the cumulative and interconnected effects of the continuing attacks on the rule of law. This was made clear in a recent interview of Timmermans published in [Handelsblatt](#). To the question "Why don't you do anything against the authoritarianism of Prime Minister Viktor Orbán?," Timmermans offered the following answer: "Because it's not so easy. The Hungarian government is acting quite cleverly – like a driver who exceeds the speed limit but puts on the brakes just before there is trouble." This is not inaccurate but as noted by FIDH in a must-read report on ["Hungary: Democracy under Threat"](#) published in November 2016:

While each one of the violations listed in this report may not perhaps in itself constitute sufficient grounds to speak of systematic and irreversible violation of the rule of law, with the authorities frequently arguing that such and such a measure or law has been borrowed or is similar to those of other EU Member States, consideration of all these violations taken together, and the mass of resulting infringements enables us to see that in the system set up by the Hungarian authorities since 2010, lies a network of grey areas and stumbling blocks that draws an opaque picture where the principles of the rule of law seem ineffective.

This network constitutes a «best of» the worst practices in the field. All these violations taken together demonstrate a concerted action by the State that can only be premeditated, in order to take control systematically, with determination and to the sole advantage of the supporters of Fidesz, of the whole State apparatus, with disregard for the necessary separation of powers, with disregard for the sound organization of democratic checks and balances, including civil society, with disregard for fundamental rights and the principle of non-discrimination and in flagrant violation of the principles underpinning the rule of law. (...)

Such systematic and concerted action cannot be merely admonished sporadically on the basis of a specific violation of a particular directive or regulation. It is crucial that the EU finally consider the violations as a whole and with what they reveal as a concerted attempt against its founding values.

The effective takeover of the Polish Constitutional Tribunal by PiS judges follows the same trajectory. It is not a single action, taken alone, but followed the party's consolidation of its grip on the media which, in turn, follows on its capture of the civil service, prosecutor's office and more. This pattern should signal a similarly ambitious campaign to undermine all independent institutions and to make them dependent on the governing party. If the

Hungarian precedent is any indication, one can expect PiS to start using these newly captured institutions for their own partisan-political purposes. And, as in Hungary, the government will not rest until every last bastion of opposition is smashed.

The capture of the Constitutional Tribunal will now allow the Polish government to adopt unconstitutional measures without having to fear any adverse consequences on the legal front. Public opinion may be a different matter, but if all can see that the Tribunal will back the government, there is no point for civil society to bring the cases challenging the new laws. Ironically, the EU does offer one solution for those in the political opposition in countries whose governments are consolidating autocratic rule. Those unwilling to live with these political changes can take advantage of their free movement rights to leave. Since 2010, about 500,000 Hungarians have left their country to escape various policies of the Orbán government, from the constant surveillance and harassment of opposition figures, to the abolition of social benefits for those who are not affiliated with the governing party, to the sudden removal of scholarships from students who do not tow the party line, and more. By providing an avenue for those under political pressure to leave, the EU allows the rogue states to govern even more peacefully without resistance. Poland might even learn from Hungary how to adjust the electoral laws to make it nearly impossible for these opposition members who have left the country to vote in subsequent elections (see [Scheppele, Hungary, An Election in Question, Part 4](#)).

If PiS eventually gains the required majority in a subsequent rigged election to revise the national constitution, the next step would be to reshape it so as to further entrench their power. This is what happened in Hungary. With the adoption of the so-called Fourth Amendment to the Hungarian Constitution in Spring 2013, nearly all of the laws that the pre-captured Constitutional Court had declared unconstitutional under the new Constitution were inserted directly into the Constitution. In addition, the entire jurisprudence of the Constitutional Court from 1990-2011 was nullified and the Court was prevented it from reviewing that or other constitutional amendments for their consistency with the rest of the text. The result was the entrenchment of constitutional capture (see [Scheppele's Testimony before the US Congress](#))

By failing to trigger Article 7 TEU at that point, the Commission abdicated its duties. Unsurprisingly, after a brief chorus of condemning noises, they acted like nothing had happened and not even the recent destruction and erasure of Hungary's largest circulation [newspaper Népszabadság](#) and the recent [murky deal to involve Russia](#) in the building of nuclear reactors seem have led to any effective reactions. The Commission now treats Hungary as if it is a normal country. But this is a new normal, to say the least.

The cases of Hungary and Poland, to only mention EU examples, suggests a new worrying pattern in the fate of constitutional democracies. There is now a recipe for constitutional capture being followed in one state after another:

1. First people lose faith in the system;
2. Then they vote to break the system by electing populist autocrats who trash the pre-existing constitution with cleverly crafted legalistic blueprints borrowed from other 'successful' autocrats, a pattern that led Prof Cooley to speak of a new "[League of Authoritarian Gentlemen](#)";
3. To remain popular while doing so, these autocrats engage in benefit giveaways while shutting down the democratic opposition and all opposition-friendly (or for that matter truth-friendly) news outlets while they also bully NGOs and any independent-minded civil servants, judges, lawyers academics and military officers still remaining;
4. They then change the election law, the electorate (by pushing the opposition out of the country) or both;
5. When people eventually wake up to the damage done, it is too late because their constitutional system has been captured and no constitutional avenue remains to challenge the government any longer;
6. In the unlikely situation where resistance emerges from the Parliament, biased referenda can always be organised to confirm the will of the leader under the guise of the will of 'the people';
7. Having sealed the space against dissenting voices and rewritten electoral regulations, autocrats can then expect to get the votes they need to win subsequent elections without much effort. In this way, the rotation

of power from one party to another becomes a feature of the past.

2.2 Looking beyond Article 7 to Preserve the Rule of Law?

Since EU institutions, and in particular the intergovernmental ones, appear unwilling to resort to Article 7 TEU even when faced with the most blatant and systemic attacks on the rule of law by authorities that openly mock them, it may be time for scholars unwilling to let Poland or Hungary slide into illiberalism to declare Article 7 dead for all intents and purposes. And since the ordinary infringement procedure (as currently interpreted and applied) and political persuasion (either outside or within the rule of law framework) have also not served as effective tools to prevent constitutional capture of democratic systems previously based on the rule of law, what legal and non-legal avenues are left as potential options to deal with the current situation in Poland?

We would urge the Commission to respond to systemic attacks on the rule of law by launching [systemic infringement actions](#). Even without the other EU institutions, it still has the power to act. In a systemic infringement action, the Commission would up the ante against rogue Member States by adjusting the normal infringement action in two ways: 1) By packaging together a set of distinct infringements in a single infringement action, the Commission would show that it can connect the dots the same way that the autocrats do by acknowledging that the takeover of multiple independent institutions is part of a common plan to erode checks and balances; 2) By attaching a more systemic legal theory to this package, the Commission could identify that systemic infringements call for systemic diagnosis and treatment. The Commission could bring such a packaged claim either under Article 4(3) TEU by arguing that the Member State is systematically thwarting the realisation of EU law within its legal system. Or the Commission could package a set of ordinary *acquis* violations with violations of the Charter of Fundamental Rights to indicate that these violations rise to a more serious level (in fact, the [Commission has already done this once](#) with regard to Hungary's asylum policy). Alternatively, the Commission could charge a violation of Article 2 values directly, under the rubric of the rule of law. After all, if it could trigger Article 7 to address rule of law violations, why couldn't it use its ordinary powers to attempt a legal resolution before moving to the more "nuclear" political strategy of Article 7?

Under any of these legal theories for bringing a systemic infringement action, the Commission – if backed by the Court of Justice – would give itself more room to insist on systemic compliance with the principles of EU law and not just the formal letter of the *acquis*. This systemic approach is crucial to preventing cosmetic patches from disguising the underlying systemic problems. If the Commission is unwilling to reinterpret the infringement procedure in this way, we call on Member States, as suggested by Prof Kochenov, to rediscover [Article 259 TFEU](#) and test the approach advocated above in the Court of Justice. It may be worth recalling that under this Treaty provision, one or more Member States can file an infringement action directly against another Member State for violating EU law and bring the matter before the Court of Justice. There is no reason why one or more Member States themselves could not construct these infringement actions to be more systemic as we have suggested.

If one of these more systemic procedures results in an adverse judgment of the Court of Justice, and the Commission tries and fails to get the Member State in question to comply, the Commission could return to the Court under Article 260 TFEU to request a large fine, as befits a large violation, and penalty payments where relevant. In fact, given the capacious wording of Article 260 TFEU, we see no reason why the Commission couldn't deduct the resulting fine from the funding streams allocated to the offending Member State from EU coffers. Nothing in Article 260 requires that the money to pay the fine come from the state treasury to the EU. Money is fungible, and it would provide an added incentive for the Member State to comply if its regional or cohesion or other funds were temporarily suspended in the amount of the this fine, pending compliance with a judgment of the Court of Justice.

In fact, financial sanctions may be the most promising way forward considering the political constraints that seem to paralyse all of the EU institutions. Indeed, Poland and Hungary are two of the largest recipients of EU regional and cohesion funding and as the recent example of Poland shows, new welfare benefits, which appear unaffordable in the long term, were used to "buy" popularity while the capture of the Polish state is taking place (see e.g. Foy and Huber, "Polish pension U-turn alarms economics but cheers voters", [Financial Times](#), 3

December 2016). While suspending already committed EU funding would itself breach the rule of law absent reasoned opinions within the footprint of existing EU law, a number of options may be explored. Attaching the suspension of funds to a judgement under Article 260 TFEU is one. But there are other possibilities. As suggested by Marek Grela, who was Poland's first permanent representative to the EU (cited by Taylor, "For EU, Poland is not yet lost", [Politico.eu](http://politico.eu), 23 Nov. 2016), "the Commission could declare that the absence of independent judicial scrutiny and the sacking of experts means it can no longer certify that EU funds are being properly spent", which "could justify additional safeguards before structural or agricultural funds are disbursed." EU money could also be rerouted through infra-national authorities, sidestepping the central government. Direct or indirect financial support for civil society groups should also be examined.

Looking beyond the attacks on the rule of law, EU Member States need to wake up to the fact that the actions of Hungary's Orbán and Poland's Kaczyński provide a model that can easily spread to other EU Member States taken over by populists with autocratic ambitions. This means that, even apart from a desire to preserve the rule of law, EU institutions ought to take serious action against Poland and against Hungary so as to further prevent the EU from being undermined from within by an even larger group of states whose elections have gone populist. If we allow a minority or a grouping of EU Member States to show complete disregard for values and key principles underlying the functioning of the EU, there may be no other way forward than reconstituting the EU without those who have chosen an illiberal path. But as we can see with Brexit and the problems of disentangling debtor countries from the Euro-zone, breaking up is hard to do. Better to fix the problems while the EU still can.

Hungary might have appeared to EU institutions as a one-off. But now that Poland is following suit, we can see that worst practices travel around the EU just as well as – and perhaps even better than – best practices. With populist parties gaining in many Member States and the [Visegrád group seemingly gaining influence](#) within the EU, it is time for the EU to realise that this is a threat that must be addressed now. Europe's other crises may look more pressing, but none of the other crises reaches as deep into the future of Europe as this one.

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